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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 1004

KNIGHT MORLEY CORPORATION, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below, together with its opinion on rehearing (Pet. App. A 1a-11a), is reported at 251 F. 2d 753. The findings of fact, conclusions of law, and order of the Board (R. 489a-516a, 430a-488a) are reported at 116 NLRB 140.[1]

JURISDICTION

The decree of the court below was entered on December 18, 1957 (Pet. App. B 13a). A petition for rehearing was denied on February 13, 1958 (*ibid.*). The petition for a writ of certiorari was filed on May 14,

[1] References designated "R" refer to the Joint Appendix to the briefs of the parties in the court below.

1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act by discharging a group of employees who walked out because of abnormally dangerous working conditions.

2. Whether the court below properly upheld the Board's finding that a strike of petitioner's employees was caused by petitioner's unfair labor practices, even though the court set aside one of the unfair labor practice findings.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Sec. 151, *et seq.*), are set forth in Appendix C of the petition (Pet. 15a-16a).

STATEMENT

A. The Board's findings of fact

In relevant part, the Board found that petitioner violated Section 8(a)(1) and (3) of the Act by discharging 17 buffing-room employees who engaged in a walkout because of abnormally dangerous working conditions; by discharging 86 other employees who struck in protest against the dismissal of the buffing-room employees and petitioner's other unfair labor practices; and by subsequently refusing to reinstate a number of the strikers upon application for employment. The Board also found that petitioner violated Section 8(a)(1) and (5) of the Act by refusing to

discuss and negotiate with the employees' bargaining representative in regard to the buffers' grievance concerning their discharge, and by insisting that any new contract apply only to employees who had not struck. The evidentiary facts underlying these findings are as follows:

1. The discharge of the buffers.

Petitioner manufactures automobile parts and accessories at its plant in Richmond, Michigan (R. 433a, 439a; 74a-75a). Its employees were represented by the UAW-CIO under a collective bargaining contract containing clauses banning strikes during the term of the contract and establishing a grievance procedure (R. 434a-438a; 520a-524a).

As part of its facilities, petitioner operates a buffing room in which the various parts produced by it are ground and buffed on large abrasive and polishing wheels (R. 439a; 52a-54a, 18a-81a, 152a-153a). These grinding and polishing operations create a considerable amount of grit, abrasive particles, dust, and lint. To carry off this dust and other matter, petitioner operates a blower system (R. 490a, 439a-440a; 82a-84a).

On Friday, August 28, 1953, the switch box controlling the blower was destroyed by fire. The afternoon shift remained idle while efforts were made to repair the blower. At 10:00 p.m., the blower still failing to operate, the men were sent home by the superintendent. This was customary whenever the blower failed to function (R. 490a, 440a; 93a, 115a, 189a-190a). A new switch box was installed on Saturday, August 29, but in the process the wires were reversed on the motor, causing the fan to run backwards (R. 490a; 97a-98a, 415a).

On Monday, August 31, the morning shift discovered that there was insufficient suction in the blower system to draw off the dirt, dust, and lint from the grinding and buffing operations. The particles flung from the wheels got into the buffers' noses and adhered to their arms and faces (R. 490a, 440a, 153a-154a, 163a, 170a, 225a, 226a, 333a). The men complained to their foreman and soon thereafter were sent home, except three who remained to clean out the blower (R. 490a, 440a-441a; 153a-154a, 162a-163a).

The cleaning of the blower failed to improve its performance. When the afternoon-shift buffers started their machines at 3:30 p.m., the dust, lint, dirt, and abrasives flung from the buffing wheels flew into the men's faces, irritating their throats and noses and making it difficult to breathe (R. 490a, 441a-442a, 458a, 108a, 111a-113a, 125a-126a, 134a-135a, 139a-140a, 184, 234a, 657, 660). This did not occur when the blower was functioning normally (R. 111a, 126a, 139a, 154a-155a, 164a, 184a, 226a). The weather at the beginning of the shift was hot and humid, registering 98 degrees in the shade outside (R. 490a, n.4, 457a; 125a, 138a). A thermometer in the buffing room showed 110 degrees that afternoon (R. 490a, 441a, 457a; 112a, 118a). The buffing room became fogged with lint and the men's arms and clothing became coated with dust (R. 490a, 458a; 112a, 138a, 184a). The buffers complained about the dust and the dirt to the chief steward and to the Union President (R. 443a-444a; 186a, 234a-236a). These complaints were taken up with management. The foreman checked the situation, as did the superintendent, and petitioner's president, Morley (R. 443a-444a; 234a-236a). After further investigation, Morley concluded that the blower was working satisfactorily and,

through the superintendent, ordered the men to keep on working under penalty of discharge (R. 444a, 90a-91a, 187a, 411a).

After discussing the matter among themselves, the men, fearing the consequences of continuing to work under such hazardous conditions, walked out of the plant at 5:15 p.m. (R. 491a, 442a-444a; 187a, 195a, 237a, 324a). Their testimony is uniformly to the effect that they believed it would be injurious to their health to remain at work (R. 491a, 442a; 324a, 116a, 142a, 129a-130a, 135a-136a, 188a-189a). They were all discharged when they reported for work the next afternoon (R. 491a, 445a; 100a).

Dust conditions were the same the next morning when the morning shift went to work. One buffer quit his job rather than work under such dusty conditions, fearing that he would contract "t.b." (R. 491a, 444a-445a, 459a; 177a, 330a). The others threatened to leave unless the blower were fixed (R. 177a). Finally, Morley directed that the wires on the motor be reversed as one of the buffers had suggested on the previous afternoon (R. 491a, 443a, 445a; 148a-149a, 415a). This was done late during the morning shift and it solved the problem completely (R. 491a, 445a; 148a-149a).

On the basis of expert testimony which it credited, the Board found that the effect of connecting the terminals on the blower motor in reverse was to cause the blower to revolve backwards at a 70 to 80 percent loss in general efficiency. Under such conditions, the effectiveness of the system in removing fine particles from the buffing room would be reduced to nearly zero (R. 491a-492a, 446a-447a; 286a-287a). Operating with this loss of efficiency, petitioner's blower system fell far short of meeting the safety standards set by Michigan

law or deemed adequate under present-day engineering standards as embodied in modern industrial codes (R. 35a-36a, 55a, 279a-286a). Continuing to work under the hot and humid conditions existing in the buffing room would cause severe physiological stress among the workers and would lead to heat prostration or cramps within one to three hours, and the workers so affected, if not given prompt and adequate medical care, might possibly die (R. 492a, 447a; 297a-303a, 308a). While exposure to the dust and other matter resulting from the polishing and buffing operations would not place the health of the worker in immediate danger, it might cause minor irritations of the nose and throat which would be uncomfortable but not disabling. Prolonged exposure to the dust and dirt and inhalation of the polishing compound over a period of time would, however, be seriously detrimental to the worker's health (R. 466a, 492a; 289a-293a).

2. The refusal to bargain and the discharge of the September 30 strikers.

Union representatives conferred with Morley on September 1 and 8 and sought to persuade him to reinstate the discharged buffers (R. 467a; 175a, 206a-207a, 412a-413a, 426a, 909a). On September 18 the Union submitted to petitioner a formal written grievance based on the discharge of the buffers (R. 468a; 49a, 209a, 223a). The parties discussed the grievance on September 14, 18, 21, 24, and 25, in the course of bargaining negotiations for a new labor contract, but reached no agreement regarding the buffers (R. 468a; 207a-215a). At the close of the September 25 meeting, petitioner announced it was withdrawing whatever proposals it had theretofore made for settling the various

grievances and that its duty to discuss the buffers' grievance further would end with the expiration of the contract at midnight that day. Petitioner thereafter refused to discuss the matter, and indicated that if the Union wanted to press the buffers' grievance further it should exhaust the procedure established in the expired contract rather than take it up as a part of the negotiations for a new contract (R. 502a-503a, 469a-471a; 243a, 247a-248a, 251a-253a).

At a meeting of the bargaining committee of the Union on September 29, the employee members of the committee urged the International Representative of the Union to seek an immediate meeting with respondent to bargain about all unresolved issues, stating that because of "the over-all situation" they could not assume responsibility for holding off strike action longer than the next morning. One of the factors in the employee unrest was petitioner's discharge of the 17 buffers (R. 499a; 248a-249a).

The next morning, September 30, no meeting with petitioner having taken place in the meantime, 86 employees, two-thirds of petitioner's working force, walked out on strike (R. 499a; 176a, 248a-249a). A few returned to work when Morley warned them that they would be discharged if they walked out (R. 501a, 461a; 176a).

By letter dated October 1, the next day, petitioner notified each of the strikers that the plant was operating as usual, and "in the event you do not report for work * * * by Monday, October 5, the Company will consider that you have quit your employment and you will be replaced by other or new employees" (R. 501a, 461a; 101a-103a, 346a-348a, 39a). On October 5, petitioner cancelled the group insurance of the strikers,

indicating on the notice to the insurance company that the strikers' employment was "terminated" as of that date (R. 501a-502a, 461a; 41a-44a).

On October 14, petitioner took the position, at the bargaining conference held that day, that it was not obliged to bargain regarding a contract covering the employees who had failed to respond to its letter of October 1 (notifying the strikers to return before October 5). Although the Union spokesman urged that the strike did not suspend petitioner's obligation to bargain and that any contract would be applicable to strikers as well as non-strikers, petitioner adhered to the position that any contract negotiated would apply only to those employees who had not struck (R. 502a-503a, 462a, 471a; 250a-252a).

By letter dated June 12, 1954, the Union notified petitioner that the strike was ended and requested reinstatement of all the strikers. Petitioner replied that there had been a great many "replacements," and it would only "give consideration" to the reinstatement of any strikers who had made individual applications for reinstatement (R. 499a; 45a-48a). Up to the date of the hearing before the Trial Examiner, on August 17, 1954, petitioner had reinstated only three of the former strikers (R. 500a; 387a-395a).

B. The Board's decision and order

In relevant part, the Board found that the working conditions in the buffing room on August 31, 1953, were abnormally dangerous, and that the 17 afternoon-shift buffers walked out because of their good-faith belief that such was the case. The Board found that in these circumstances the buffers, when they walked out, were engaged in protected concerted activity under Section

7 of the Act and that accordingly their dismissal was discriminatory and in violation of Section 8(a)(3) and (1) of the Act (R. 489a-499a). In reaching this conclusion, the Board held that Section 502 of the Labor Management Relations Act, 1947 was intended to protect the right of employees to quit their labor without penalty in order to protect their health and lives, and that such action is not in contravention of a no-strike provision in a collective bargaining agreement such as existed between petitioner and the Union (R. 497a-498a).

The Board further found that the strike of September 30, 1953, in which approximately two-thirds of petitioner's employees participated, was caused and prolonged in part by the discriminatory discharge of the buffers and by other unfair labor practices committed by petitioner (including petitioner's refusal to bargain with the Union concerning the buffers' grievance arising from their discharge), and that petitioner violated Section 8(a)(1) and (3) of the Act by discharging these strikers on October 5, 1953 (R. 499a-502a). Finally, the Board found that petitioner had violated Section 8(a)(1) and (5) of the Act by refusing to bargain in relation to the buffers' grievance after the expiration of the collective bargaining agreement, and further by refusing to bargain with the Union with respect to the striking employees (as evidenced by its insistence that any new contract would apply only to non-strikers and not to the strikers) (R. 502a-505a).

The Board's order requires petitioner to cease and desist from the unfair labor practices found (R. 508a-509a). Affirmatively, the order requires petitioner, upon request, to bargain collectively with the Union, to offer reinstatement to the 17 buffers and the

86 other employees who were discharged for striking in protest against petitioner's unfair labor practices, and to make whole all employees for their losses resulting from petitioner's discrimination against them (R. 508a-510a).

C. The decision of the court below

With one exception, the court below sustained the Board's unfair labor practice findings, and it enforced the Board's order in full (Pet. App. A 4a-10a). The exception relates to the Board's finding that petitioner violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union concerning the buffers' grievance with respect to their discharge. The court was of the view that since the grievance arose during the life of the contract, which expired on September 25, the employer could properly insist that the matter be processed through the grievance procedure established by the contract even though the contract itself had expired. However, the court held, the rejection of the Board's finding in this respect did not require a modification of the Board's bargaining order since petitioner's further refusal to bargain with the Union on behalf of the striking employees was violative of the Act. Since these employees had struck in protest against petitioner's unfair labor practices, they "retained their employee status and their bargaining representative was entitled to recognition in their behalf" (Pet. App. A 9a-10a).

ARGUMENT

1. As the Board and the court below found, the buffers walked out of the plant on August 31 because of their good-faith belief that the heat and dust condi-

tions in the buffing room were abnormally dangerous. In essence, the walkout was in protest against conditions of employment; in the most literal sense, it constituted concerted activity for the purpose of mutual aid and protection within the meaning of Section 7 of the Act. Cf., *e.g.*, *National Labor Relations Board* v. *J. I. Case Co.*, 198 F. 2d 919, 921-922 (C.A. 8); *Modern Motors, Inc.* v. *National Labor Relations Board*, 198 F. 2d 925, 926 (C.A. 8); *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817, 818-819 (C.A. 3); *Gullett Gin Co.* v. *National Labor Relations Board*, 179 F. 2d 499 (C.A. 5). It needs no argument that the discharge of employees based upon their participation in such activity normally constitutes a violation of the Act. *Ibid.* Petitioner's argument (Pet. 15-17) that the employees' action constituted a form of "insubordination" outside the protection of the Act is wholly wide of the mark and presents no substantial issue warranting further review by this court.

The ruling below on this aspect of the case does not, as petitioner asserts, conflict with *National Labor Relations Board* v. *Kohler Co.*, 220 F. 2d 3 (C.A. 7). There, the Seventh Circuit concluded that the quitting of work by 12 employees, allegedly because certain fans in the plant had been turned off, was not concerted activity within the meaning of the Act because some of these employees indicated that their purpose was to cease working "when they felt like it" and others testified that they left the plant because of "their personal decision" unrelated to any group activity. In these circumstances, the court concluded that the employees were not engaged in "concerted action for a change in . . . working conditions," but, rather, were insisting "on remaining at work on their own terms and condi-

tions" 220 F. 2d at p. 11. The intermittent and individual character of the work stoppages in that case serve to distinguish it from the instant case.

Petitioner further argues (Pet. 17-20) that the buffers' walkout was in violation of the collective bargaining agreement, which contained a no-strike provision and also established a procedure for the settlement of grievances. To begin with, it is unrealistic to suppose that the no-strike commitment in the contract and the grievance procedure, which is necessarily time-consuming, were intended to cover emergency situations, such as that presented here, when employees stop work because of abnormally dangerous conditions. Moreover, the provision against strikes and the related grievance procedure are to be read in the light of Section 502 of the Labor Management Relations Act. That section provides that the quitting of labor by employees in good faith because of abnormally dangerous conditions shall not be deemed a strike under the statute. This provision, as the Board explained in detail (R. 497a-498a), was obviously inserted to remove such quitting of work from the area of unlawful work stoppages and to safeguard the right of employees to quit their labor without penalty in order to protect their lives and their health. So viewed, as the court below concluded (Pet. App. A 8a), the work stoppage cannot be deemed a strike in breach of contractual commitments. Cf. *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 279-280. The Fifth Circuit's decision in *National Labor Relations Board* v. *American Manufacturing Co.*, 203 F. 2d 212, does not hold to the contrary, as petitioner asserts. In that case there was no "imminent" danger to the employees (203 F. 2d at 215, n. 5); the collective bargaining contract

provided that the employer would have a reasonable opportunity to correct dangerous conditions; and the employees' bargaining representative had reached an understanding with the employer for the correction of the grievance. The court concluded that in these circumstances the work stoppage was not caused by abnormally dangerous conditions and further that it was "inconsistent" with the understanding between the employer and the employees' representative and the contract provisions affording the employer a reasonable opportunity to take corrective steps. That is not this case.

Equally insubstantial is petitioner's further argument (Pet. 20-21) that the buffers failed to give notice that they were walking out because of abnormally dangerous conditions and that hence there is no basis for concluding that petitioner in discharging them sought to penalize them for engaging in a protected activity. The short answer is that, in the circumstances summarized above (pp. 4-5), petitioner could have had no doubt as to the cause of the walkout. Formal notice would have been superfluous.

2. Petitioner argues (Pet. 22-23) that the court below, having set aside the Board's finding that petitioner committed an unfair labor practice when it refused to discuss in the negotiations for a new contract the buffers' grievance concerning their discharge (*supra*, pp. 6-7, 10), could not consistently conclude that the strike of September 30 was caused by petitioner's unfair labor practices. The contention is based on the erroneous premise that the sole cause of the strike was petitioner's refusal to bargain concerning the buffers' discharge. But as the Board, with the approval of the court below, made clear (R. 500a-

501a), "the fact that the discharge of the buffers was discriminatory, and the fact that the strike of September 30 was caused at least in part by the discriminatory discharge of the buffers, are sufficient to support a finding that the strike was an unfair labor practice strike in its inception." Moreover, petitioner discharged the September 30 strikers shortly after the inception of the strike; hence even if the strike were regarded as economic in origin, the discharge of the strikers on October 5 constituted, under settled principles, a violation of the Act warranting the Board's remedial order with respect to these strikers. *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. 2d 919, 927-928 (C.A. 2); *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898, 902 (C.A. 3); *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 750 (C.A. 9); *National Labor Relations Board* v. *U. S. Cold Storage Corp.*, 203 F. 2d 924, 927 (C.A. 5), certiorari denied, 346 U.S. 818; *National Labor Relations Board* v. *McCatron*, 216 F. 2d 212, 215 (C.A. 9), certiorari denied, 348 U.S. 943.

CONCLUSION

The decision below is plainly correct and presents either a conflict of decisions nor any substantial issue warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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